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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO GARZA CANCHOLA,

Defendant and Appellant.

H044154

(Monterey County

Super. Ct. No. SS141485A)

I. INTRODUCTION

Defendant Armando Garza Canchola appeals after a jury found him guilty of two counts of assault (Pen. Code, § 240),¹ one count of assault on a peace officer (§ 245, subd. (c)), and one count of active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found true allegations that defendant personally inflicted great bodily injury (§ 122022.7, subd. (a)) and allegations that he committed the assault on a peace officer to benefit a criminal street gang (§ 186.22, subd. (b)(1)). The trial court found true an allegation that defendant had a prior serious felony conviction (§ 667, subd. (a)(1)) and an allegation that defendant had two prior “strike” convictions (§ 1170.12, subd. (c)(2)). The trial court sentenced defendant to an aggregate prison term of 40 years to life.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends the trial court erred by allowing the prosecution to introduce evidence that defendant had previously been convicted of voluntary manslaughter, and that the evidentiary ruling violated his due process rights. Defendant further contends that the trial court erroneously believed it could not dismiss the gang enhancement or strike the punishment for that enhancement.

We find no evidentiary error with respect to the admission of defendant's prior voluntary manslaughter conviction, but we will reverse the judgment and remand the matter so the trial court may determine whether to exercise its discretion to dismiss the gang enhancement.

II. BACKGROUND

Defendant's convictions arose from a group assault on Monterey County Sheriff's Deputy Nicholas Menezes, by inmates in a Norteño pod at the Monterey County Jail. At trial, the prosecution's theory was that the assault was directed by the pod's "shot-caller," inmate Alberto Cortez. The defense argued that the evidence did not show an assault ordered by the gang and that there was no evidence defendant ever "touched" Deputy Menezes during the incident.

A. The Jail Assault

On May 25, 2014, Monterey County Sheriff's Deputy Michelle Bossuot was observing Deputies Max Crowell, Bryan Whaley, and Menezes as they pat searched inmates from the J pod in preparation for allowing those inmates to go out to the yard. The inmates were lined up along a wall in a hall outside the J pod, a designated Norteño pod.

Inmate Giovanni Pacheco would not spread his legs when directed to do so by Deputy Menezes. As Deputy Menezes tried to search Pacheco, Pacheco elbowed him in the chest. Deputy Menezes therefore put Pacheco into a "wrist lock" and escorted Pacheco back into the pod, with Deputy Crowell following. Deputy Menezes placed

Pacheco in handcuffs and escorted Pacheco back out of the pod. Some of the inmates began “talking shit,” and Pacheco began kicking Deputy Menezes in the legs. Deputy Menezes ordered Pacheco to drop to his knees, but Pacheco did not do so. Deputy Menezes then did a “leg sweep” to get Pacheco to his knees.

Cortez yelled, “Get him. Get him. Get him.” In response, at least five inmates—including defendant—ran over and began attacking Deputy Menezes, who was kneeling on the ground next to Pacheco. Deputy Menezes was kicked in the face, causing his head to snap backwards. He felt punches “raining” down on his head and neck. He fought his way up to a standing position and covered his head with one arm, using the other arm to try to “fend off as many people” as he could. He could see defendant in the group that was attacking him. At one point, defendant was trying to pull Deputy Menezes down.

Deputy Menezes was able to access his baton and began using it to strike the inmates who were attacking him. Meanwhile, Deputy Bossuot called for backup, pulled out her Taser, and aimed the Taser at defendant, who was throwing punches towards Deputy Menezes. Deputy Crowell used his baton to strike other inmates involved in the assault. He hit two inmates on the back and hit one inmate on the head. Another inmate was tased by Deputy Whaley.

After the deputies got the inmates under control, Marcos Zamora, one of the other inmates who had been involved in the assault told Cortez (the “shot-caller”), “Look what they did to my head.” Cortez responded, “Don’t worry, we’ll get them back.”

After the assault, Deputy Menezes was “covered in blood” and appeared to be disoriented. He was taken to the hospital, where he received stitches for a cut above his eye. He was diagnosed with a traumatic brain injury. For about a year after the assault, he had trouble walking, especially going up and down stairs. Deputy Menezes was still receiving follow-up medical treatment at the time of trial, for post-concussion syndrome and a pinched nerve in his neck. Deputy Menezes had no feeling in parts of his arm. He

also had cognitive deficits, headaches, nausea, and dizziness. He had not worked since the incident.

B. Gang Expert Testimony

Monterey County Sheriff's Deputy Jesse Pinon testified as the prosecution's gang expert. He described how the "Norteno-Sureno thing" started in California prisons with the Nuestra Familia organizing to combat the bullying that northern Hispanic inmates were experiencing from Mexican Mafia inmates. He described how both the Mexican Mafia and the Nuestra Familia are "very sophisticated," with a hierarchy from the prison to the streets. On the streets, Norteños are the Nuestra Familia's "foot soldiers."

In the Monterey County Jail, the Nuestra Familia has a "shot-caller or leader" and a chain of command. If a Norteño inmate attacks a jail deputy, it shows the gang member's power and "that they're willing to do whatever for the gang."

During Deputy Pinon's testimony, the parties informed the jury of a stipulation: "that the defendant has been convicted of voluntary manslaughter, with an enhancement that it was done for the benefit of the gang." The jury was informed that the conviction arose from an "event that happened in 2010." According to Deputy Pinon, the fact that defendant had admitted having committed a homicide for the benefit of the gang was significant to him, because it showed defendant's "willingness to do things for the gang" even if there was a risk to his future. Defendant was willing to spend the rest of his life in prison for the gang.

Deputy Pinon had researched defendant's prior contacts with law enforcement, finding indicia of gang association such as defendant's clothing, tattoos, statements, and companions. One tattoo read, "Soulless against all odds." It meant defendant had "no heart" and was "willing to do whatever he can for the gang" without a second thought. Defendant's jail and prison records showed he was an active Norteño gang member. Defendant had not been assaulted while he was housed in J pod, showing that "he was in good standing" with the gang.

Deputy Pinon had also researched the backgrounds of the other inmates in J pod, the majority of whom had Norteño gang affiliation. He described how Norteños follow the “Fourteen bonds,” which are essentially bylaws. The “bonds” include “backing up” a fellow gang member and “not being a coward.”

Deputy Pinon was familiar with Cortez, who had previously been convicted of murder for the benefit of a gang. Cortez had a tattoo reading “scrap killer.” The word “scrap” referred to Sureños. Cortez also had other gang-related tattoos. Deputy Pinon believed Cortez was a shot-caller in the Monterey County jail.

Deputy Pinon described the “shot-caller” in a jail’s gang pod as the person who makes all the decisions for the pod. If a shot-caller in a Norteño jail pod told other Norteños in the pod, “Get him, get him, get him,” referring to a deputy, that would be perceived as “an order from the gang to the soldiers of the gang.” The gang members would be required to attack the deputy; if they did not, they would be subject to discipline from the gang for an “act of cowardice.” The discipline could include being assaulted or killed. A group assault on a deputy would strengthen the power of the gang by showing that the gang is “not scared of the law.”

Deputy Pinon described the primary activities of “Nortenos in the Norteno pods in the Monterey County Jail” as including the commission of murder, manslaughter, assault with a deadly weapon, robbery, extortion, carjacking, and other crimes. He agreed a pattern of criminal gang activity was shown by the murder Cortez committed for the benefit of the gang, the manslaughter defendant committed for the benefit of the gang, and the assault on Deputy Menezes by members of the gang.

C. Defense Case

The emergency room doctor who treated Deputy Menezes had diagnosed him with a “closed head injury.” Deputy Menezes had complained of having been punched in the face. X-rays of his neck did not show any abnormalities. However, a bulging disc or pinched nerve would not have appeared on an x-ray.

Monterey County Sheriff's Deputy David Vargas interviewed Deputy Menezes by phone the day after the assault. Deputy Menezes said he was taking pain medication, and he was having difficulty communicating. Deputy Vargas therefore set up a meeting about a week later, on June 3, 2014. At that time, Deputy Menezes had a scar from his laceration, but he had no other bruising on his face.

D. Charges, Verdicts, and Sentence

Defendant was charged with battery with injury on a peace officer (§ 243, subd. (c)(2); count 1), battery with serious bodily injury (§§ 242/243, subd. (d); count 2), assault on a peace officer (§ 245, subd. (c); count 3), and active participation in a criminal street gang (§ 186.22, subd. (a); count 4). The amended information alleged that defendant personally inflicted great bodily injury on Deputy Menezes (§§ 969f, subd. (a), 12022.7, subd. (a)), that defendant committed counts 1-3 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that defendant had two prior voluntary manslaughter convictions that qualified as serious felonies (§ 667, subd. (a)(1)) and strikes (§ 1170.12, subd. (c)(2)).

In counts 1 and 2, a jury found defendant not guilty of the two felony battery charges but guilty of the lesser included offense of assault (§ 240) as to both counts. The jury found defendant guilty of count 3 (assault on a peace officer) and count 4 (active participation in a criminal street gang). The jury found true the allegation that defendant personally inflicted great bodily injury in the commission of counts 3 and 4, and it found true the gang allegation associated with count 3. The trial court found true one prior serious felony conviction allegation and both prior "strike" allegations.

At the sentencing hearing held on November 17, 2016, the trial court imposed an aggregate term of 40 years to life, comprised of an indeterminate term of 25 years to life for count 3 (assault on a peace officer), a determinate term of 10 years for the criminal street gang allegation associated with count 3, and a determinate term of 5 years for the prior serious felony allegation. The terms for counts 1, 2, and 4 were stayed pursuant to

section 654, and the term for the great bodily injury allegation associated with count 3 was also stayed. The trial court ordered defendant's sentence in this case to run consecutive to his sentence in case No. SS102792A.

III. DISCUSSION

A. Admission of Prior Voluntary Manslaughter Conviction

Defendant contends the trial court erred by allowing the prosecution to introduce evidence that he had previously been convicted of voluntary manslaughter. He contends the trial court abused its discretion under Evidence Code section 352 by admitting the prior conviction as a predicate offense to show a pattern of criminal gang activity (§ 186.22, subd. (e)), and he also contends the trial court abused its discretion by admitting the prior conviction to show motive and intent under Evidence Code section 1101, subdivision (b). Defendant further contends that the admission of the prior conviction evidence violated his due process rights.

1. Proceedings Below

The People's motions in limine included a request that defendant's two prior convictions for voluntary manslaughter be admitted. The People asserted that the prior convictions showed that defendant had previously "killed for the benefit of, at the direction[] of, or in association with, the Norteno criminal street gang," and thus that the prior convictions were admissible to prove defendant's gang membership, his intent to act for the benefit for or at the direction of the gang, his "disregard for consequence," and the pattern of gang activity required by section 186.22, subdivision (e). The People argued that the prior convictions were admissible under Evidence Code section 1101, subdivision (b) and as predicate offenses under section 186.22.

Defendant filed a motion in limine opposing the admission of his prior voluntary manslaughter convictions. Defendant argued admission of the prior convictions would violate Evidence Code section 1101, subdivision (a). He also argued that evidence of his

prior convictions would not be relevant to the current charges because his conduct was not similar, that such evidence would be significantly more prejudicial than probative, and that such evidence would consume an undue amount of time. He further argued that admission of the prior conviction evidence would violate his Fifth and Sixth Amendment rights.

In his motion in limine, defendant provided the facts underlying his prior voluntary manslaughter convictions. One conviction arose out of a shooting on October 6, 2010. The passenger in a van had been shot. The second conviction arose out of a shooting on July 2, 2008. Again, the shooting victim was the passenger in a vehicle. The prosecution's theory was that both victims were killed because they were "drop out gang members." Defendant had a jury trial on two counts of first degree murder, but the jury deadlocked. Defendant ultimately pleaded guilty to two counts of voluntary manslaughter and admitted a gang allegation.

During a hearing on the motions in limine, the prosecutor confirmed he wanted to use defendant's prior voluntary manslaughter convictions as predicate crimes "as part of the gang evidence." Defendant's trial counsel asserted that the prosecutor could use other crimes as predicates and that use of defendant's prior convictions for that purpose would be "extraordinarily prejudicial." The prosecutor acknowledged that he had evidence of predicate offenses committed by other inmates involved in the jail assault, but the trial court indicated it was not inclined to "tell the prosecution . . . which predicates to move on."

Alternatively, defendant's trial counsel requested the prior offenses be sanitized so the jury would learn only that defendant had "committed a felony for the benefit of the gang." Defendant's trial counsel also pointed out that only one of defendant's prior convictions could be used as a predicate offense, since the prosecution would need to "prove another predicate by another person" in order to establish a pattern of criminal

gang activity. (See § 186.22, subd. (e).) The prosecutor noted that conviction of “a felony” would not meet section 186.22’s requirement of a predicate offense.

The trial court ruled that it would allow one of defendant’s voluntary manslaughter convictions to be used as a predicate offense—the one with a gang enhancement. The trial court indicated it was relying “significantly” on *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*), which held “that a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion” and “that the prosecution may have the ability to develop evidence of predicate offenses committed by other gang members does not require exclusion of evidence of a defendant’s own separate offense to show a pattern of criminal gang activity.” (*Id.* at p. 1044.)

The trial court found that Evidence Code section 352 did not require exclusion of the voluntary manslaughter conviction. First, because there was a conviction, there was no risk the jury would “be tempted to punish” defendant for his underlying conduct. Second, the evidence was not cumulative because the prosecution was not seeking to present a large number of predicate offenses. The trial court found that the prior conviction had substantial probative value.

The trial court next considered whether the voluntary manslaughter conviction was admissible to show motive and identity. (See Evid. Code, § 1101, subd. (b).) The trial court noted that the gang allegation was the only aspect of the prior conviction that was “probative on these issues.” However, since the voluntary manslaughter conviction was being admitted as a predicate, there was no need to sanitize it, and sanitizing it could cause the jury to speculate that defendant had yet another conviction.

Defendant’s trial counsel argued that only the prior voluntary manslaughter conviction itself should come in, not the underlying facts. The trial court and prosecutor both agreed.

Prior to opening statements, defendant’s trial counsel noted that the prosecutor was intending to show the jury a photograph of defendant with text indicating that he had

previously “admitted committing manslaughter for the benefit of the gang.” The trial court reaffirmed its ruling that the conviction was being admitted as a predicate offense and also to show motive and intent.

As noted above, the jury heard the following stipulation during the gang expert’s testimony: “[T]he defendant has been convicted of voluntary manslaughter, with an enhancement that it was done for the benefit of the gang.” The jury was informed that the conviction arose from an “event that happened in 2010.”

During the jury instruction conference, the trial court clarified that for purposes of Evidence Code section 1101, subdivision (b), it had found relevant “the gang enhancement” associated with defendant’s voluntary manslaughter conviction, but not the voluntary manslaughter conviction itself.

In arguments to the jury, the prosecutor discussed the elements of count 4, the gang offense. He referenced Deputy Pinon’s testimony about the primary activities of the Norteño gang and reminded the jury that the gang’s crimes included murder and violent assaults. He also reminded the jury that Cortez had committed a murder for the benefit of the gang and that “defendant himself killed a human being for the benefit of the gang.”

The prosecutor also discussed the pattern of criminal gang activity element, explaining that although there had been testimony that Norteño gang members had committed many other crimes, the prosecution had “picked specific ones that match the characters in this event.” “One is October 6, 2010, the defendant committed voluntary manslaughter, and had a gang enhancement conviction. This defendant killed a human being for the benefit of the gang.” The prosecutor also referenced Cortez’s conviction of murder as well as the charged offense.

The prosecutor argued that defendant’s gang membership was shown by, inter alia, his prior voluntary manslaughter conviction: “You . . . don’t kill human beings for the benefit of the gang unless you’ve committed to the gang. He is all in.”

The jury was instructed, pursuant to CALCRIM No. 375: “The People presented evidence through a stipulation that the defendant committed another offense of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang that was not charged in this case. . . . [¶] . . . [¶] If you decide that the defendant committed the uncharged offense, you may but are not required to consider that evidence for the limited purpose of deciding whether or not, one, the defendant acted with the intent to commit each offense to promote, further, or assist in criminal conduct by Norteno gang members, or two, the defendant had a motive to commit the offenses alleged in this case. [¶] . . . [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining whether the Nortenos engaged in a pattern of criminal gang activity [¶] . . . [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one fact to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the crimes charged in this case, or that the allegations have been proved. The People must still prove each charge and allegation beyond a reasonable doubt.”

2. Predicate Offense/Evidence Code Section 352²

Defendant contends the trial court abused its discretion under Evidence Code section 352 by admitting his prior voluntary manslaughter conviction as a predicate offense to show a pattern of criminal gang activity section 186.22, subdivision (e).

In *Tran*, the California Supreme Court held that for purposes of section 186.22, a predicate offense can be established “by proof of an offense the defendant committed on

² Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

a separate occasion.” (*Tran, supra*, 51 Cal.4th at p. 1046.) The *Tran* court refused to hold that a defendant’s prior conviction should be excluded if the prosecution can establish the pattern of criminal gang activity through other predicate offenses. (*Id.* at pp. 1048-1049.)

The *Tran* court rejected the defendant’s claim that “the inherent prejudice” in evidence of a defendant’s prior conviction generally requires its exclusion under Evidence Code section 352.” (*Tran, supra*, 51 Cal.4th at pp. 1048-1049.) The court explained that the decision whether to admit or exclude such evidence depended on the factors the court had previously identified in *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*). Those factors include: whether the evidence comes from “a source independent of evidence of the charged offense,” whether the uncharged acts resulted in a criminal conviction, and whether the uncharged acts evidence is “no stronger or more inflammatory” than the evidence of the charged offense. (*Tran, supra*, at p. 1047; see *Ewoldt, supra*, at pp. 404-405.)

The *Tran* court noted that a gang-related prior conviction generally has “greater” probative value in a gang case because the prior conviction “provides direct evidence of a predicate offense, that the defendant actively participated in the criminal street gang, and that the defendant knew the gang engaged in a pattern of criminal gang activity.” (*Tran, supra*, 51 Cal.4th at p. 1048.) Moreover, the prejudice from a prior gang offense “typically will be less when the evidence is admitted to establish a predicate offense” than when it is admitted to prove “an intermediary fact from which guilt may be inferred,” since a prior gang offense provides direct evidence of a violation of section 186.22. (*Tran, supra*, at p. 1048.) In establishing the elements of a gang offense or allegation, the prosecution will present other evidence “tending to show the defendant actively supported the street gang’s criminal activities” and thus the admission of the defendant’s own prior offense will generally not present an “ ‘intolerable “risk to the fairness of the proceedings or the reliability of the outcome.” ’ [Citation.]” (*Ibid.*)

The *Tran* defendant was charged with murder, attempted murder, and active participation in a criminal street gang, based on evidence that he and other members of his gang shot at two people who they believed to be rival gang members. (*Tran, supra*, 51 Cal.4th at pp. 1045-1046.) To establish the predicate offenses required for the pattern of criminal gang activity, the prosecution presented evidence of (1) prior shootings committed by another member of the defendant's gang and (2) "a series of extortions" by the defendant and other gang members, which involved some of the perpetrators firing shots and making threats and which resulted in the defendant being convicted of extortion. (*Ibid.*)

The *Tran* court found that the trial court properly exercised its discretion under Evidence Code section 352 by admitting evidence of the defendant's extortion conviction "and related activities." (*Tran, supra*, 51 Cal.4th at p. 1050.) The evidence was "highly probative," as it not only provided direct evidence of a predicate offense but also because it showed the defendant's active participation in a gang and his knowledge that the gang engaged in a pattern of criminal gang activity. (*Ibid.*) The probative value of the evidence was "enhanced" by the fact it "emanated from independent sources," and the evidence was "not particularly cumulative" since the prosecution's only other predicates were the charged offense and the shootings by one other gang member. (*Ibid.*) The evidence was not "unduly prejudicial," since there was "little danger of confusing the issues," no risk the jury might convict the defendant of the charged offenses to punish him for the extortion, and the extortion evidence was less inflammatory than the evidence of the charged offenses. (*Ibid.*) Finally, a limiting instruction helped ensure the jury would not use the prior conviction evidence to prove the defendant had a bad character or a disposition to commit crimes. (*Ibid.*)

Defendant contends *Tran* is distinguishable from his case. He points out that the *Tran* court found the prior extortion evidence less inflammatory than the charged murder because although there was evidence of shots being fired during the extortions, "there

was no evidence anyone was killed or injured or that *defendant* personally shot or threatened anyone.” (See *Tran, supra*, 51 Cal.4th at p. 1050.) In contrast, defendant’s prior conviction was for a homicide offense, which was more serious than the charged battery and assault crimes, in which defendant’s role was—according to defendant—“unclear.” Defendant acknowledges that his prior conviction had probative value with respect to elements of the gang allegation and gang offense, but he asserts the prosecution had “ample other evidence” to use for proof of those elements such that defendant’s own convictions were “ ‘merely cumulative.’ ”

In analyzing this issue, we follow the Supreme Court’s direction in *Tran*. The probative value of the evidence of defendant’s prior conviction here was “enhanced” because it came from “a source independent of the charged offense.” (See *Tran, supra*, 51 Cal.4th at p. 1047.) The prejudicial value of the evidence was decreased by the fact that the uncharged acts resulted in a criminal conviction. (See *ibid.*) While voluntary manslaughter is a serious offense, the evidence of defendant’s prior offense was “no stronger or more inflammatory” than the evidence of the charged offense (see *ibid.*), since the current charges were also serious, as they included felony assault on a peace officer and allegations that defendant personally inflicted great bodily injury, and because the jury learned of defendant’s prior offense by stipulation without being informed of any of the facts underlying defendant’s conviction. The evidence of defendant’s prior voluntary manslaughter conviction was also “highly probative,” since it provided evidence of a predicate offense and showed defendant’s active participation in a gang as well as his knowledge that the gang engaged in a pattern of criminal gang activity. (See *id.* at p. 1050.) The evidence was “not particularly cumulative” since the prosecution only introduced evidence of two other offenses as predicates: the murder committed by Cortez and the charged offense. (See *ibid.*) Finally, the limiting instruction helped ensure the jury would not use the prior conviction evidence to prove defendant had a bad character or a disposition to commit crimes. (See *ibid.*) On this record, the trial court did

not abuse its discretion by determining that the potential prejudicial effect of defendant's prior voluntary manslaughter conviction did not substantially outweigh the evidence's probative value. (See Evid. Code, § 352; *Tran, supra*, at p. 1050.)

3. Intent and Motive/Evidence Code Section 1101

Defendant contends the trial court erred by admitting his prior voluntary manslaughter conviction to show intent and motive under Evidence Code section 1101, subdivision (b) because there was no showing "that the conduct underlying the prior voluntary manslaughter conviction bore any similarity to the conduct in the case at bar." He contends the prior conviction only showed propensity and that any probative value was substantially outweighed by the danger of undue prejudice.

"Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of [Evidence Code] section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*).) Thus, evidence may be admitted to prove, among other things, motive and intent. (Evid. Code, § 1101, subd. (b).)

"When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." [Citation.]'" (*Fuiava, supra*, 53 Cal.4th at p. 667.)

“The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] ‘[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act’ [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ‘probably harbor[ed] the same intent in each instance.’ [Citations.]’ [Citation.]” (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

We review a trial court’s ruling on admission of evidence for a purpose specified in Evidence Code section 1101 for abuse of discretion. (See *Fuiava, supra*, 53 Cal.4th at pp. 667-668.)

Defendant argues that there was no showing that his prior voluntary manslaughter offense was sufficiently similar to the charged offense as to support the inference that he “ ‘probably harbor[ed] the same intent in each instance.’ [Citations.]’ [Citation.]” (*Ewoldt, supra*, 7 Cal.4th at p. 402.) He asserts that the only alleged similarity was that the prior offense was committed for the benefit of a gang. He claims the prior offense showed only that he “had an inclination to commit crimes for the benefit of the gang—i.e., a propensity or disposition,” which was an impermissible purpose.

The prior offense and current offense both involved defendant’s assaultive conduct against victims who had not provoked defendant personally, but who had committed perceived acts of disrespect against the gang itself or a fellow gang member. During both incidents, defendant acted on behalf of the gang, to help enforce its rules and to show the power of the gang. The uncharged misconduct was thus “sufficiently similar” to the charged offense “to support the inference that the defendant ‘probably harbor[ed] the same intent in each instance.’ [Citations.]’ [Citation.]” (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

Defendant further argues that even if the prior voluntary manslaughter conviction was admissible to show his intent and motive, it was cumulative of other evidence showing defendant's gang affiliation, such as his J-pod housing, prior prison classifications, and tattoos. But none of that other evidence showed that defendant had actually engaged in gang activity. The evidence of defendant's gang affiliation was not so extensive as to make the prior conviction evidence "merely cumulative regarding an issue that was not reasonably subject to dispute." (*Ewoldt, supra*, 7 Cal.4th at p. 406.)

Finally, defendant argues that even if the prior voluntary manslaughter conviction was admissible to show his intent and motive, the trial court should have excluded the evidence pursuant to Evidence Code section 352. Defendant contends the prior conviction had minimal probative value but a substantial potential prejudicial impact because it was likely to inflame the jurors, who were considering whether defendant had been involved in the charged assault. As explained above, however, the factors relevant to an Evidence Code section 352 analysis did not require exclusion of the prior conviction evidence. The prior conviction evidence came from "a source independent of the charged offense" (*Tran, supra*, 51 Cal.4th at p. 1047), the uncharged acts resulted in a criminal conviction, the evidence was "no stronger or more inflammatory" than the evidence of the charged offense (*ibid.*), the evidence was admissible to show elements of the gang enhancement and gang offense, and there was a limiting instruction, which we presume the jury followed (*People v. Case* (2018) 5 Cal.5th 1, 32). Thus, the trial court did not abuse its discretion by determining that the potential prejudicial effect of defendant's prior voluntary manslaughter conviction did not substantially outweigh the evidence's probative value. (See Evid. Code, § 352.)

4. Due Process

Defendant contends the admission of his prior voluntary manslaughter conviction violated his Fourteenth Amendment due process rights, in that it "rendered his trial fundamentally unfair." He makes this argument both with respect to admission of the

prior conviction as a predicate offense and with respect to admission of the prior conviction to show intent and motive. However, since we have not found that admission of the prior conviction evidence was error under state law, we need not decide “the consequences of that error, including . . . whether the error was so serious as to violate due process.” (*People v. Partida* (2005) 37 Cal.4th 428, 437.)

B. Sentencing – Gang Enhancement

Defendant contends that the trial court erroneously believed it could not dismiss the gang enhancement or strike the punishment for that enhancement. Based on the California Supreme Court’s recent opinion in *People v. Fuentes* (2016) 1 Cal.5th 218 (*Fuentes*), which was decided after defendant’s sentencing, the Attorney General concedes that the trial court had such discretion. The Attorney General joins defendant’s request that this court remand the matter so the trial court can consider whether to exercise its discretion to strike or dismiss the enhancement.

1. Proceedings Below

At the sentencing hearing, defendant’s trial counsel argued that the trial court had discretion to “stay” the gang enhancement pursuant to section 1385. The trial court disagreed that it had “discretion . . . to dismiss that” and imposed an aggregate term of 40 years to life, comprised of an indeterminate term of 25 years to life for count 3, a determinate term of 10 years for the gang allegation associated with count 3, and a determinate term of 5 years for the prior serious felony allegation. The terms for counts 1, 2, and 4 were stayed pursuant to section 654, and the term for the great bodily injury allegation associated with count 3 was also stayed.

2. Analysis

In *Fuentes*, the court considered whether a trial court’s section 1385 discretion to dismiss an “action” applied to gang enhancements in light of section 186.22, subdivision (g), which allows trial courts to “strike the additional punishment” for such enhancements. (*Fuentes, supra*, 1 Cal.5th at p. 222.) The court concluded “that trial

courts possess the section 1385 discretion to strike a gang-related enhancement alleged under section 186.22(b). [Citation.]” (*Id.* at p. 231.)

At the time of sentencing in this case, the California Supreme Court had not yet provided trial courts with direction on whether section 1385 applied to gang enhancements. In light of *Fuentes*, we agree with the parties that remand is appropriate, so the trial court can consider whether to exercise its discretion to dismiss the gang enhancement.

IV. DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court. On remand, the trial court shall determine whether to exercise its discretion to dismiss the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) pursuant to Penal Code section 1385. If the trial court decides to strike the gang enhancement, it shall resentence defendant. If the trial court decides not to strike the gang enhancement, it shall reinstate the judgment.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.